CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 50

J. E. RILEY INVESTMENT COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 11, 1940.

CERTIORARI GRANTED MAY 20, 1940.

BLANK PAGE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 50

J. E. RILEY INVESTMENT COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX.

	Page
Proceedings before United States Board of Tax Appeals	1
Docket entries	1
Petition	3
Exhibit—Notice of deficiency	6
Answer to petition	12
Amended petition	14
Answer to amended petition	17
Memorandum findings of fact and opinion, Leech, M.	19
Decision	29
Petition for review and assignments of error	29
Praecipe for record	36
Clerk's certificate	37
Proceedings in U. S. C. C. A., Ninth Circuit	39
Designation of record	39
Statement of points to be relied upon	40
Order of submission	45
Order directing filing of opinion and judgment	45
Judgment	46
Order directing filing of opinion, etc., and denying petition for rehearing	47
Opinion, Healey, J.	48
Dissenting opinion, Mathews, J.	58
Order staying issuance of mandate	59
Clerk's certificate	60
Order allowing certiorari	61

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 26, 1940.

—9429

BLANK PAGE

APPEARANCES

For Taxpayer:
ROBERT ASH, Esq.,
For Comm'r.:
F. B. SCHLOSSER, Esq.

Docket No. 88273

J. E. RILEY INVESTMENT COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1937

Mar. 1—Petition received and filed. Taxpayer notified. (Fee paid)
" 2—Copy of petition served on General Counsel.
Apr. 28—Answer filed by General Counsel.
" 29—Amended petition lodged by taxpayer.
" 30—Copy of answer served on taxpayer.
" 30—Motion for leave to file amended petition filed by taxpayer. 5/3/37 granted.
May 4—Copy of motion and amended petition served on General Counsel.
" 10—Answer to amended petition filed by General Counsel
" 12—Copy of answer served on taxpayer.

1938

Jan. 4—Notice issued placing proceeding on Washton, D. C. calendar.

Mar. 19—Hearing set 5/5/38.

Apr. 1—Motion to strike from calendar of 5/5/38 and continue for hearing on or before Oct. 1, 1938 filed by taxpayer.

" 6—Motion to strike from calendar of 5/5/38 and continue for hearing on or before Oct. 1, 1938 granted.

1939

Jan. 11—Hearing set March 2, 1939.

Mar. 2—Hearing had before Mr. Leech on merits. Submitted. On oral motion of petitioner, original petition corrected as to amount of deficiency involved. No objection—granted. Petitioner's brief due 3/31/39—respondent 5/1/39—petitioner's reply 5/17/39.

Mar. 13—Transcript of hearing of March 2, 1939 filed.

" 17—Brief filed by taxpayer. 3/17/39 copy served.

Apr. 24—Brief filed by General Counsel.

May 10—Memorandum findings of fact and opinion rendered, J. Russell Leech, Div. 6. Decision will be entered for the respondent.

" 11—Decision entered, J. Russell Leech, Div. 6.

Jun. 15—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

1939

Jun. 15—Proof of service filed by taxpayer.

" 15—Praecipe for the record filed by taxpayer with proof of service thereon. [1*]

United States Board of Tax Appeals

Docket No. 88273

J. E. RILEY INVESTMENT COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:E:7:8:HFS-90D) dated January 19, 1937, and as a basis of its proceeding, alleges as follows:

(1) The petitioner is a corporation organized and existing by virtue of the laws of the State of Nevada, with its principal office and place of business at Flat, Alaska.

(2) The notice of deficiency, a copy of which is attached, and made a part of this petition by reference, is dated January 19, 1937.

(3) The taxes in controversy are income and profits taxes for the year 1934 in the total amount

*Page numbering appearing at the foot of page of original certified Transcript of Record.

of $3,216.62 of which $1,618.41 is a deficiency asserted by the respondent and $2,598.21 represents an overpayment.

(4) The determination of tax set forth in the said notice of deficiency is based upon the following error: [2]

The Commissioner erred in refusing to permit the petitioner to deduct statutory percentage depletion from income.

(5) The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner's mines and activities are conducted at Flat, Alaska, which is several hundred miles from the nearest city.

(b) In its income tax return for 1934, petitioner showed gross receipts from its gold miining operations, in the amount of $99,711.56.

(c) The said original return for 1934 did not deduct, or mention, depletion of any kind, either cost or percentage.

(d) During the year 1935, the officers of the petitioner were advised for the first time of the provisions of Section 114 (b)-4 of the Revenue Act of 1934, which permitted taxpayers engaged in metal mining to take a depletion deduction at the rate of 15% of the gross income from the property.

(e) As a result of the information referred to in the preceding paragraph, the petitioner, on or about February 8, 1936, mailed to the Collector of Internal Revenue at Tacoma, Washington, an amended return for 1934, upon which a deduction of percent-

age depletion was taken, in the amount of $13,600.57. The letter accompanying the amended [3] return requested a refund, based upon the depletion deduction referred to.

(f) Upon audit of the return for 1934, the respondent determined the deficiency in tax, based upon the disallowance of certain accrued interest, and refused to allow the depletion deduction.

(g) Petitioner contends that the said depletion deduction is proper.

Wherefore the petitioner prays that this Board may hear the proceeding, and:

(a) Determine that petitioner is entitled to a deduction on account of percentage depletion.

(b) Grant such other and further relief as the Board may deem proper.

(s) ROBERT ASH
Munsey Building,
Washington, D. C.
Attorney for Petitioner.

District of Columbia—ss.

Harry Donnelley, being duly sworn, says that he is the Superintendent and Fiscal Agent of the J. E. Riley Investment Company, above-named; that he is duly authorized to verify the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements contained therein and the facts stated are true.

(s) HARRY DONNELLEY

Subscribed and sworn to before me this 26th day of February, 1937.

(s) DOIS M. CLAXTON
Notary Public.

My Comm. ex. 2/15/41. [4]

Jan. 19, 1937

IT:E:7:8
RFS-90D
J. E. Riley Investment Company
Flat, Alaska

Sirs:

You are advised that the determination of your income tax liability for the taxable year(s) 1934 discloses a deficiency of $453.50 and that the determination of your excess profits tax liability for the year(s) mentioned discloses a deficiency of $164.91 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1934, notice is hereby given of the deficiencies mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiencies above stated.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The

signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner,

By (Signed) W. T. SHERWOOD,
Acting Deputy Commissioner

Enclosures:
Statement
Form 870
Schedules 1 and 2
HFS/1h-3 [5]

STATEMENT

IT:E:7.8
HFS-90D

In re: J. E. Riley Investment Company
Flat, Alaska

Tax Liability for Taxable Year 1934

	Liability	Assessed	Deficiency
Income tax	$4,147.20	$3,693.70	$453.50
Excess-profits tax	1,195.57	1,030.66	164.91

The deficiencies shown herein are based upon the report dated October 26, 1935 of the internal revenue agent in charge at Seattle, Washington, a copy

of which was furnished you. The adjustments are shown in the attached schedules numbered 1 and 2.

Careful consideration has been given to your protest dated February 10, 1936 in connection with the report of the revenue agent in charge; also to your claim for the refund of $2,598.21 and your amended return. The claim will be disallowed for the following reasons.

The claim is based upon an amended return filed on March 3, 1936 which reflects a deduction of percentage depletion of $13,600.57.

Under section 114(b)-4 of the Revenue Act of 1934 taxpayers are permitted to take depletion upon a percentage basis. This section provides, however, that a taxpayer, making his first return under this title, shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made, computed with or without regard to percentage depletion, and if the taxpayer fails to make such statement in the first return, the depletion allowance for such property for such years shall be computed without reference to percentage depletion.

Under this section it appears that you have failed to make an election in the original 1934 return, and cannot, therefore, be allowed to later claim depletion upon the percentage basis. The entire cost of your assets having been previously recovered by normal depletion allowances based on cost. no depletion can be allowed for the year 1934.

Percentage depletion was allowed for the year 1933, although not claimed on your original return for that year, since section 114(b)-4 of the Revenue Act of 1932 did not require the election for the year 1933, but did require that with [6] the return for 1933 an election for the years subsequent to 1933 be made.

Official notice of the disallowance of your claim will be issued by registered mail in accordance with section 1103 (a) of the Revenue Act of 1932.

In case you agree to the entire amount of the deficiencies please fill in the amounts of $453.50 and $164.91 on the enclosed form 870 (Waiver of Restrictions) and forward it, properly executed, to the Commissioner of Internal Revenue, Washington, D. C. However, if you do not acquiesce in all of the adjustments making up the deficiencies indicated, but would like to stop the accumulation of interest on that part of the deficiencies resulting from adjustments to which you agree, please fill out the form 870 inserting therein the amounts you desire to have assessed at once. In the event that you agree to only a part of the deficiencies indicated, the execution of the form for the agreed portion of the deficiencies will not deprive you of your right to petition the United States Board of Tax Appeals for a redetermination of the deficiencies for the year to which it relates.

MFS/ih-3 [7]

J. E. Riley Investment Company
Year ended December 31, 1934

Schedule 1

Adjustments to Net Income

Net income as disclosed by original return		$25,863.27
As corrected		30,161.49
Net adjustment as computed below		$ 4,298.22
Unallowable deductions and additional income:		
(a) Accrued interest	$3,554.78	
(b) Error in computation	1,000.00	
Total		4,554.78
Nontaxable income and additional deductions:		
(c) Territorial taxes	256.56	
Total		256.56
Net Adjustment as above		$ 4,298.22

Explanation of Items

(a) On each of the income tax returns for prior years in which a net income was reported you claimed a deduction for accrued interest. The exact nature of this item is not clearly stated but apparrently covers interest on some of the original obligations assumed by you upon incorporation, and subsequent loans. It does not appear that this accrued interest has ever been entered on your books.

For the year 1934 accrued interest was claimed on your return in the amount of $3,554.78. Your books are kept on a cash basis; this interest for 1934 was not paid during the year and from an examination of your income tax return this office holds

that you are in fact upon a cash basis. The evidence available is not considered sufficient to justify the allowance of accrued interest as claimed, even if it were held that you are on the accrual basis as claimed on your amended return.

(b) In deducting total deductions of $3,554.78 from total income of $30,418.05 on your original return, an error of [8] $1,000.00 was made. Correction of this error increases net income as reflected in such original return by $1,000.00.

(c) Territorial tax eliminated from deductions per books in the preparation of your return is an allowable deduction.

Schedule 2
Computation of Tax
Income Tax

Net income for taxable year	$30,161.49
Income tax at 13¾%	4,147.20
Income tax previously assessed:	
Account #406019	3,693.70
Deficiency of income tax	453.50
Net income for excess-profits tax computation	30,161.49
Less: 12½% of $50,000.00 value of capital stock as declared in your capital stock tax return for year ended June 30, 1934	6,250.00
Amount subject to excess-profits tax	23,911.49
Excess-profits tax 5% of $23,911.49	1,195.57
Excess-profits tax assessed:	
Original, account #400019	1,030.66
Deficiency of excess-profits tax	$ 164.91

HFS/1h-3

[Endorsed]: U. S. B. T. A. Filed Mar. 1, 1937.

[9]

[Title of Board and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled proceeding, admits and denies as follows:

(1) Admits that the petitioner is a corporation organized and existing by virtue of the laws of the State of Nevada, with an office and place of business at Flat, Alaska.

(2) Admits the allegations contained in paragraph (2) of the petition.

(3) Admits that the taxes in controversy are income and excess-profits taxes for the year 1934. Denies the remaining allegations contained in paragraph (3) of the petition.

(4) Denies that error was committed as alleged in paragraph (4) of the petition.

(5) (a) For lack of information or belief sufficient to form an opinion as to the truth thereof, denies the allegations contained in subparagraph (a) of paragraph (5) of the petition.

(b) and (c) Admits the allegations contained in subparagraphs (b) and (c) of paragraph (5) of the petition. [10]

(d) For lack of information or belief sufficient to form an opinion as to the truth thereof, denies the allegations contained in subparagraph (d) of paragraph (5) of the petition.

(e) Admits that sometime in 1936 petitioner filed an amended return for 1934 with the Collector of Internal Revenue at Tacoma, Washington, upon which a deduction of percentage depletion was claimed in the amount of $13,600.57. Admits that a claim for refund was filed by petitioner, based on such claimed depletion deduction.

(f) Admits that upon audit of the return for 1934, the respondent determined a deficiency in taxes, based upon the disallowance of certain accrued interest and certain other adjustments, and refused to allow the claimed depletion deduction.

(g) Denies the allegations contained in subparagraph (g) of paragraph (5) of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amounts determined by the Commissioner, viz., $453.50 in income tax and $164.91 in excess-profits tax, a total of $618.41, for the year 1934.

(Signed) MORRISON SHAFROTH
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
F. R. SHEARER,
B. M. BRODSKY,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: U. S. B. T. A. Filed April 28, 1937.

[Title of Board and Cause.]

AMENDED PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:E:7:8:HFS-90D) dated January 19, 1937, and as a basis of its proceeding, alleges as follows:

(1) The petitioner is a corporation organized and existing by virtue of the laws of the State of Nevada with its principal office and place of business at Flat, Alaska.

(2) The notice of deficiency, a copy of which is attached to the original petition, and made a part of this petition by reference, is dated January 19, 1937.

(3) The taxes in controversy are income and profits taxes for the year 1934 in the total amount of $4,216.62 of which $1618.41 is a deficiency asserted by the respondent and $2,598.21 represents an overpayment.

(4) The determination of tax set forth in the said notice of deficiency is based upon the following error [12]

The Commissioner erred in refusing to permit the petitioner to deduct statutory percentage depletion from income.

(5) The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner's mines and activities are conducted at Flat, Alaska, which is several hundred miles from the nearest city.

(b) In its income tax return for 1934, petitioner showed gross receipts from its gold mining operations, in the amount of $99,711.56.

(c) The said original return for 1934 did not deduct, or mention, depletion of any kind, either cost or percentage.

(d) During the year 1935, the officers of the petitioner were advised for the first time of the provisions of Section 114 (b)-4 of the Revenue Act of 1934, which permitted taxpayers engaged in metal mining to take a depletion deduction at the rate of 15% of the gross income from the property.

(e) As a result of the information referred to in the preceding paragraph, the petitioner, on or about February 8, 1936, mailed to the Collector of Internal Revenue at Tacoma, Washington, an amended return for 1934, upon which a deduction of percentage depletion was taken, in the amount of $13,600.57. The letter accompanying the amended [13] return requested a refund, based upon the depletion deduction referred to.

(f) Upon audit of the return for 1934, the respondent determined the deficiency in tax, based upon the disallowance of certain accrued interest, and refused to allow the depletion deduction.

(g) Petitioner contends that the said depletion deduction is proper.

Wherefore, the petitioner prays that this Board may hear the proceeding, and:

(a) Determine that petitioner is entitled to a deduction on account of percentage depletion.

(b) Grant such other and further relief as the Board may deem proper.

(s) ROBERT ASH
Munsey Building,
Washington, D.C.
Attorney for Petitioner.

Territory of Alaska—ss.

Sam'l Applebaum, being duly sworn, says that he is the President of the J. E. Riley Investment Company, above-named; that he is duly authorized to verify the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements contained therein and the facts stated are true.

(s) SAM'L APPLEBAUM

Subscribed and sworn to before me this 1st day of April 1937.

(s) Y. M. GARLAND
United States Commissioner

[Endorsed]: U S.B.T.A. Lodged April 29, 1937. Filed May 3, 1937. [14]

[Title of Board and Cause.]

ANSWER TO AMENDED PETITION

Comes now the Commissioner of Internal Revenue, by his attorney, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed in the above-entitled proceeding, admits and denies as follows:

(1) Admits that the petitioner is a corporation organized and existing by virtue of the laws of the State of Nevada, with an office and place of business at Flat, Alaska.

(2) Admits the allegations contained in paragraph (2) of the amended petition.

(3) Admits that the taxes in controversy are income and excess-profits taxes for the year 1934. Denies the remaining allegations contained in paragraph (3) of the amended petition.

(4) Denies that error was committed as alleged in paragraph (4) of the amended petition.

(5) (a) For lack of information or belief sufficient to form an opinion as to the truth thereof, denies the allegations contained in subparagraph (a) of paragraph (5) of the amended petition.

(b) and (c) Admits the allegations contained in subparagraphs (b) and (c) of paragraph (5) of the amended petition. [15]

(d) For lack of information or belief sufficient to form an opinion as to the truth thereof, denies the allegations contained in subparagraph (d) of paragraph (5) of the amended petition.

(e) Admits that sometime in 1936 petitioner filed an amended return for 1934 with the Collector of Internal Revenue at Tacoma, Washington, upon which a deduction of percentage depletion was claimed in the amount of $13,600.57. Admits that a claim for refund was filed by petitioner, based on such claimed depletion deduction.

(f) Admits that upon audit of the return for 1934, the respondent determined a deficiency in taxes, based upon the disallowance of certain accrued interest and certain other adjustments, and refused to allow the claimed depletion deduction.

(g) Denies the allegations contained in subparagraph (g) of paragraph (5) of the amended petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amounts determined by the Commissioner, viz., $453.50 in income tax and $164.91 in excess-profits tax, a total of $618.41, for the year 1934.

(Signed) MORRISON SHAFROTH
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
F. R. SHEARER,
B. M. BRODSKY,
Special Attorneys,
Bureau of Internal Revenue. [16]

[Title of Board and Cause.]

Robert Ash, Esq., for the petitioner.
F. B. Schlosser, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION.

Leech: This is a proceeding to redetermine deficiencies in income and excess-profits taxes of $453.50 and $164.91, respectively, for the calendar year 1934. Petitioner also claims it overpaid its taxes for that year in the amount of $2,598.21. The only issue submitted relates entirely to the validity of this claim, the deficiencies having resulted from matters not here in controversy. The question for decision is whether petitioner is entitled to percentage depletion under section 114(b)(4) of the Revenue Act of 1934, despite the fact that it failed to claim it in its first return under that Act because of ignorance of the law. [17]

FINDINGS OF FACT.

Petitioner is a corporation organized under the laws of Nevada, with its principal office and place of business at Flat, Alaska. Its business is the mining of gold.

Flat is located in a remote part of Alaska on the 62nd parallel of latitude and the 158th meridian

of longitude. During the season of navigation, the usual means of travel to Flat from Seward, the seaport, is from Seward, by railroad, to Nenana on the Yukon River, a distance of 415 miles, then by water via the Yukon River to Holy Cross, a distance of over 700 miles, and thence via a tributary of the Yukon to Flat, a distance of 420 miles. When navigation is not open, travel to and from Flat is either by plane or on foot. It requires about two weeks to go over the 400-mile trail on foot from Flat to Anchorage, which is the nearest town.

The uncertainty and slowness of the winter mail service invariably resulted in current tax return forms reaching Flat too late for timely execution and filing. In order to avoid delinquency, it was the custom of petitioner's officers to use old return forms; consequently petitioner's original return for 1934 was filed on a 1933 form which had been mailed to petitioner by the Collector of Internal Revenue at Tacoma, Washington. In the winter of 1934, mail came to Flat part way by plane and part way by dog team. In order to be sure of filing the 1934 return on time, an officer of petitioner executed it on January 2, 1935, using the 1933 form, as stated. It reached Tacoma on January 29, but mail from Flat sometimes took two months in arriving at Tacoma. [18]

When petitioner's first 1934 return was filled out, its officers did not know of the statutory provisions allowing percentage depletion, but did know

that unless the law had been changed, petitioner was not entitled to depletion, as it had no basis for cost depletion. The Collector, in sending the forms, had not advised the petitioner with respect to statutory depletion, and all the knowledge then available to it on this score was contained in Instruction No. 23 attached to the 1933 form, which reads as follows:

> 23. Depletion.—If a deduction is claimed on account of depletion, secure from the collector Form D (minerals), Form E (coal), Form F (miscellaneous non-metals), Form O (oil and gas), or Form T (timber), fill in and file with return. If complete valuation data have been filed with Questionnaire in previous years, then file with this return information necessary to bring your depletion schedule up to date, setting forth in full statement of all transactions bearing on deductions or additions to value of physical assets with explanation of how depletion deduction for the taxable year has been determined. See Sections 23 (1) and 114 of the Revenue Act of 1932.

Petitioner's officer read the instructions before executing the return for 1934.

Petitioner's officers first actually learned of the statutory depletion provisions in August, 1935, when a revenue agent visited Flat and advised that petitioner was entitled to percentage depletion for both 1933 and 1934. This agent prepared reports to that

effect, as a result of which a refund was paid for 1933, but not for 1934; as to the latter year, the respondent ruled that petitioner had failed to claim percentage depletion in its original return and hence was not entitled to claim it subsequently. [19]

If petitioner's officers had known of the 1934 statutory provisions, they would have elected to take percentage depletion.

As soon as petitioner's officers were advised that percentage depletion had been disallowed, they filed both an amended return claiming such depletion in the amount of $13,600.57, and a claim for refund.

Petitioner's gross receipts from gold mining for the year 1934 were $99,711.56, and it has paid a tax for that year in the amount of $4,684.

OPINION

It is inferable from the record that the officers of petitioner were ignorant both of the 1932 and 1934 Revenue Acts with regard to percentage depletion. The 1932 Act,[1] in substance, provided that the elec-

---

(1) Section 114. Basis for Depreciation and Depletion.

* * * * * * *

(b) Basis for Depletion.—

* * * * * * *

(4) Percentage Depletion for Coal and Metal Mines and Sulphur.—The allowance for depletion shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the

tion must [20] be made by the taxpayer in its return for 1933 as to whether the depletion deduction for taxable years subsequent to 1933 should be made with or without reference to percentage depletion.

---

taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance for the taxable year 1932 or 1933 be less than it would be if computed without reference to this paragraph. A taxpayer making return for the taxable year 1933 shall state in such return, as to each property (or, if he first makes return in respect of a property for any taxable year after the taxable year 1933, then in such first return), whether he elects to have the depletion allowance for such property for succeeding taxable years computed with or without reference to percentage depletion. The depletion allowance in respect of such property for all succeeding taxable years shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for succeeding taxable years shall be computed without reference to percentage depletion. During the period for which property acquired after December 31, 1933, is held by the taxpayer—

(A) if the basis of the property in the hands of the taxpayer is, under section 113 (a), determined by reference to the basis in the hands of the transferor, donor, or grantor, then the depletion allowance in respect of the property shall be computed with or without reference to percentage depletion, according to the method of computation which would have been appli-

In other words, the taxpayer had to decide, at the time it filed his return for 1933, whether it would, as to years beginning with 1934, compute depletion on the percentage basis or on the adjusted basis, as provided by section 113 (b). Report, Senate Finance Committee, 72d Cong., 1st sess., S. Report 665, p. 30. The 1934 Act,[2] however, allowed the taxpayer a new

---

cable if the transferor, donor, or grantor had continued to hold the property, or

(B) if the basis of the property is, under section 113 (a), determined by reference to the basis of other property previously held by the taxpayer, then the depletion allowance in respect of the property shall be computed with or without reference to percentage depletion, according to the method of computation which would have been applicable in respect of the property previously held if the taxpayer had continued to hold such property.

---

(2) Sec. 114. Basis for Depreciation and Depletion.

* * * * * * *

(b) Basis for depletion.—

* * * * * * *

(4) Percentage Depletion for Coal and Metal Mines and Sulphur.—The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property. A taxpayer making his

election in this regard, to be [21] made in the first return it should file for that year and to be followed in returns for all taxable years thereafter. This election also was to be as between percentage depletion and depletion otherwise computed, "otherwise" meaning with reference to the adjusted basis provided by section 113 (b). Report, Conference Committee, 73rd Congress, 2d Sess., H. Rept. 704, p. 29.

Had petitioner's officers known of the election provided by the 1934 Act, they would have exercised it. Since petitioner had no basis for cost depletion, their "election", in the premises, would really have been as between claiming a deduction and not claiming it, for if they did not deduct by a use of the

---

first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer, either directly or through one or more substituted bases, as defined in that section.

percentage method, they could not deduct at all. Not knowing of his statutory right, their collective feeling at the time they executed the 1934 return was that they were not entitled to depletion of any kind. [22]

Substantially the same question as is here presented was before the Board in Dorothy Glenn Coal Mining Co., 38 B.T.A. 1154, and C. H. Mead Coal Co., 38 B.T.A. 1163, (on appeal CCA 4). Acting under misapprehension of the law, the respective taxpayers had failed to claim percentage depletion in their first returns under the 1934 Act, and we held that they were thereafter precluded from taking deductions for depletion computed on that basis, because they had failed to comply with the statutory condition precedent to an allowance thereof, namely: the inclusion of a statement in their original returns that they chose to compute depletion by the percentage method.

The only factual difference between the Glenn and Mead cases, on one hand, and the instant proceedings on the other, is that here the failure to claim percentage depletion arose out of ignorance of the law rather than misconstruction of the law. But that difference does not affect the result.

Taxpayers pleaded ignorance of the laws giving them rights of election, without success, in Pacific National Co. v. Welch, 304 U. S. 191; Sylvia S. Strauss, 33 B.T.A. 855; affd., per curiam, 87 Fed. (2d) 1018; Smith Paper Co., 31 B.T.A. 28; affd.,

(Export Leaf Tobacco Co. v. Commissioner), 78 Fed. (2d) 163; cert. denied, 296 U. S. 627; Alameda Investment Co. v. McLaughlin, 33 Fed. (2d) 120; Buttolph v. Commissioner, 29 Fed. (2d) 695; John D. Biggers, 39 B.T.A. ——; Liberty Realty Corp., 26 B.T.A. 1119.

Petitioner relies chiefly on Morrow, Becker & Ewing Co., Inc., v. Commissioner, 57 Fed. (2d) 1, and Connor v. United States, 19 Fed. Supp. 97, (no appeal by government), neither of which cases, we think, aids it here. [23]

Whether the plea of ignorance of the law can ever be successful, we do not now decide. It is sufficient to say that this plea was accepted in the first case cited because only a very short period had elapsed between the passage of the effective law and the date when the taxpayer had to elect thereunder the method of reporting proceeds from sales of realty. However, here, the Revenue Act of 1934, fixing the tax liability, was in effect May 10, 1934, almost a year before petitioner's return for that year was due, and almost 8 months before it was executed by petitioner. The 1932 Act, providing for an election in the 1933 return, was passed June 6, 1932. Not only that, but the instructions attached to the 1933 return, which petitioner's officer had before him when he executed the return for 1934, although they did not set out its provisions, referred to section 114 of the 1932 Act, which first authorized an election of percentage depletion. In

the Connor case, last cited, when the taxpayer filed his return, he took no credit for Canadian taxes under the option granted by section 131 of the Revenue Act of 1932, because he did not know and had no reason to suspect a Canadian tax was due. The court, holding that the statute should not be construed to require the impossible, allowed a claim for refund, based on an amended return filed after the Canadian tax had been paid. However, there is no indication in the statutory provision there applicable that time is of the essence in making that election, while there is such an express condition in section 114 (b) (4), controlling here.

The equities in this case favor the petitioner because it has lost its right to percentage depletion, not only for 1934, but all subsequent years, because it has no basis for cost depletion and has failed to claim [24] percentage depletion in its original 1934 return. However, this Board is powerless to mitigate this apparent hardship. Northport Shores, Inc., 31 B.T.A. 1013; John D. Biggers, supra. The taxpayer should seek its relief from Congress.

Decision will be entered for the respondent.

Entered May 10, 1939. [25]

United States Board of Tax Appeals
Washington

Docket No. 88273

J. E. RILEY INVESTMENT COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its Memorandum Findings of Fact and Opinion entered May 10, 1939, it is

Ordered and decided: That there are deficiencies in income and excess profits taxes in the respective amounts of $453.50 and $164.91 for the calendar year 1934.

[Seal] (s) J. RUSSELL LEECH,
Member.

Entered May 11, 1939. [26]

[Title of Board and Cause.]

PETITION FOR REVIEW
and
ASSIGNMENT OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes J. E. Riley Investment Company, by its attorney, Robert Ash, and respectfully shows:

I
Jurisdiction

The petitioner on review (hereinafter referred to as the taxpayer) is a corporation with its principal office and place of business in Flat, Alaska. Its income tax return for the year 1934 was filed with the Collector of Internal Revenue for the District of Washington at Tacoma, Washington, and within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit. [27]

The respondent on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

The taxpayer files this petition pursuant to the provisions of Sections 1001, 1002 and 1003 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, as amended by Section 1101 of the Revenue Act of 1932, as amended by Section 519 of the Revenue Act of 1934.

II
Prior Proceedings

On January 19, 1937, the Commissioner determined a deficiency in income and excess profits taxes against the taxpayer for the year 1934 in the amounts of $453.50 and $164.91, respectively, a total of $618.41, and sent by registered mail a no-

tice of said deficiencies in accordance with the provisions of Section 272 of the Revenue Act of 1934. Thereafter, and on March 1, 1937, the taxpayer filed an appeal from the said determination of the Commissioner with the United States Board of Tax Appeals.

The case was tried before the United States Board of Tax Appeals on March 2, 1939.

On May 10, 1939, the Board promulgated its Memorandum [28] Findings of Fact and Opinion, and on May 11, 1939, entered its decision, wherein it was ordered and decided that there are deficiencies in income and excess profits taxes in the respective amounts of $453.50 and $164.91, for the calendar year 1934.

III

Nature of Controversy

The question presented is whether the taxpayer, a gold mining corporation, is entitled to percentage depletion under Section 114 (b) (4) of the Revenue Act of 1934, or if it is to be denied depletion for 1934 and all succeeding years, because, on account of its isolated location in the interior of Alaska, it had no knowledge of the enactment of the provision allowing percentage depletion and, therefore, could not and did not "elect" to take the percentage depletion allowance in its original 1934 return, although such allowance was claimed in an amended return.

The Board found the facts as follows:

"Petitioner is a corporation organized under the laws of Nevada, with its principal office and place of business at Flat, Alaska. Its business is the mining of gold.

"Flat is located in a remote part of Alaska on the 62nd parallel of latitude and the 158th meridian of longitude. [29] During the season of navigation, the usual means of travel to Flat from Seward, the seaport, is from Seward, by railroad, to Nenana on the Yukon River, a distance of 415 miles, then by water via the Yukon River to Holy Cross, a distance of over 700 miles, and thence via a tributary of the Yukon to Flat, a distance of 420 miles. When navigation is not open, travel to and from Flat is either by plane or on foot. It requires about two weeks to go over the 400-mile trail on foot from Flat to Anchorage, which is the nearest town.

"The uncertainty and slowness of the winter mail service invariably resulted in current tax return forms reaching Flat too late for timely execution and filing. In order to avoid delinquency, it was the custom of petitioner's officers to use old return forms; consequently petitioner's original return for 1934 was filed on a 1933 form which had been mailed to petitioner by the Collector of Internal Revenue at Tacoma, Washington. In the winter of 1934, mail came to Flat part way by plane and part way by dog team. In order to be sure of filing the 1934 return on time, an officer of

petitioner executed it on January 2, 1935, using the 1933 form, as stated. It reached Tacoma on January 29, but mail from Flat sometimes took two months in arriving at Tacoma. [30]

"When petitioner's first 1934 return was filled out, its officers did not know of the statutory provisions allowing percentage depletion, but did know that unless the law had been changed, petitioner was not entitled to depletion, as it had no basis for cost depletion. The Collector, in sending the forms, had not advised the petitioner with respect to statutory depletion, and all the knowledge then available to it on this score was contained in Instruction No. 23 attached to the 1933 form, which reads as follows:

> "23. Depletion.—If a deduction is claimed on account of depletion, secure from the collector Form D (minerals), Form E (coal), Form F (miscellaneous non-metals), Form O (oil and gas), or Form T (timber) fill in and file with return. If complete valuation data have been filed with Questionnaire in previous years, then file with this return information necessary to bring your depletion schedule up to date, setting forth in full statement of all transactions bearing on deductions or additions to value of physical assets with explanation of how depletion deduction for the taxable year has been determined. See Sections 23 (1) and 114 of the Revenue Act of 1932.

"Petitioner's officer read the instructions before executing the return for 1934.

"Petitioner's officers first actually learned of the statutory depletion provisions in August, 1935, when a revenue agent visited Flat and advised that petitioner was entitled to percentage depletion for both 1933 and 1934. This agent prepared reports to that effect, as a result of [31] which a refund was paid for 1933, but not for 1934; as to the latter year, the respondent ruled that petitioner had failed to claim percentage depletion in its original return and hence was not entitled to claim it subsequently.

"If petitioner's officers had known of the 1934 statutory provisions, they would have elected to take percentage depletion.

"As soon as petitioner's officers were advised that percentage depletion had been disallowed, they filed both an amended return claiming such depletion in the amount of $13,600.57, and a claim for refund.

"Petitioner's gross receipts from gold mining for the year 1934 were $99,711.55 and it has paid a tax for that year in the amount of $4,684."

In its opinion, the Board states:

"Had petitioner's officers known of the election provided by the 1934 Act, they would have exercised it. Since petitioner had no basis for cost depletion, their "election", in the premises, would really have been as between claiming a deduction and not claiming it, for if they did not deduct by a use of

the percentage method, they could not deduct at all. Not knowing of this statutory right, their collective feeling at the time they executed the 1934 return was that they were not entitled to depletion [32] of any kind."

IV

ASSIGNMENTS OF ERROR

The taxpayer, as a basis of review, makes the following assignments of error:

1. The Board of Tax Appeals erred in holding that the taxpayer was not entitled to depletion under Section 114 (b) (4) of the Revenue Act of 1934.

2. The Board of Tax Appeals erred in failing to hold that the claiming of percentage depletion in its amended return for 1934 complied with the provisions of Section 114 (b) (4) of the Revenue Act of 1934 and entitled the taxpayer to percentage depletion.

3. The Board of Tax Appeals erred in deciding for the Commissioner.

Wherefore, the taxpayer petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(s) ROBERT ASH,
941 Munsey Building,
Washington, D. C.
Attorney for Petitioner. [33]

District of Columbia—ss.

Robert Ash, being duly sworn, states that he is the attorney for the petitioner above named; that he knows of the contents of the foregoing petition; that to the best of his knowledge and belief the statements contained therein are true, and that the assignments of error are well taken.

ROBERT ASH.

Subscribed and sworn to before me this 15th day of June, 1939.

[Seal] CATHERINE F. DOLAN,
Notary Public.

My comm. exp. 2/15/44.

[Endorsed]: U.S.B.T.A. Filed June 15, 1939.

[34]

[Title of Board and Cause.]

PRAECIPE FOR THE RECORD

To the Clerk of the United States Board of Tax Appeals:

Will you please prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit certified copies of the following documents in the above entitled case:

(1) Docket entries of proceedings before the United States Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals.

(3) Memorandum Findings of Fact and Opinion entered May 10, 1939.

(4) Decision of Board of Tax Appeals entered May 11, 1939, determining deficiencies in income and excess profits tax for the calendar year 1934.

(5) Petition for review.

(6) This praecipe for the record. [35]

The foregoing are to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Fifth Circuit.

(s) ROBERT ASH,
Munsey Building,
Washington, D. C.
Attorney for Petitioner.

Service of a copy of the foregoing is acknowledged this 15th day of June, 1939.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for the Respondent.

[Endorsed]: U.S.B.T.A. Filed June 15, 1939. [36]

[Title of Board of Cause.]

CERTIFICATE

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 36, inclusive, contain and are a true copy of

the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 29th day of June, 1939.

[Seal] B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

[Endorsed]: No. 9234. United States Circuit Court of Appeals for the Ninth Circuit. J. E. Riley Investment Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed July 10, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit

No. 9234

J. E. RILEY INVESTMENT COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DESIGNATION OF RECORD

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

In accordance with Rule 19, subparagraph 6, of the rules of practice of your Court, will you please print the entire record in the above-entitled cause, as transmitted to you by the Clerk of the United States Board of Tax Appeals.

ROBERT ASH,
941 Munsey Building,
Washington, D. C.
Attorney for Petitioner.

Service of a copy of the foregoing is acknowledged this 15th day of July, 1939.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Washington, D. C.
Attorney for the Respondent.

[Endorsed]: Filed July 19, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

PETITIONER'S STATEMENT OF POINTS TO BE RELIED UPON

In accordance with Rule 19, paragraph 6, petitioner submits the following statement of points on which it intends to rely.

I

"Election" is dependent upon the opportunity to choose between two or more conflicting courses and, in the absence of such opportunity to choose, there can be no "election".

II

Petitioner had no opportunity to "elect" to take percentage depletion in its 1934 return so should not be denied such depletion.

III

There is no statutory provision for amended tax returns, but they are recognized by the Treasury and have been uniformly construed as being amendments or supplements to the original return.

IV

An "election" made upon an amended tax return is a valid "election" under the statute here involved and entitles petitioner to percentage depletion.

V

The Congressional intent was to allow depletion to metal miners and to liberalize the depletion provisions of the statute. The remedial statute should be construed to carry out its purposes and not, as the Board of Tax Appeals construed it in this case, to entirely deny a depletion deduction and thus defeat the purposes of the statute.

ROBERT ASH,
Munsey Building,
Washington, D. C.
Attorney for Petitioner.

Service of a copy of the foregoing is acknowledged this 3rd day of August, 1939.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

[Endorsed]: Filed Aug. 7, 1939. Paul P. O'Brien, Clerk.

BLANK PAGE

No. 9234

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. E. RILEY INVESTMENT COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

BLANK PAGE

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, November 30, 1939.

Before: Denman, Mathews and Healy, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered petition to review in above cause argued by Mr. Robert Ash, counsel for petitioner, and by Mr. Ellis Slack, Special Assistant to the Attorney General, counsel for respondent, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, December 26, 1939.

Before: Denman, Mathews and Healy, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, Ordered that the type-

written opinion* this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[*Clerk's note: Opinion withdrawn pursuant to opinion and order filed March 16, 1940.]

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9234

J. E. RILEY INVESTMENT COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JUDGMENT

Upon petition to Review a Decision of the United States Board of Tax Appeals.

This Cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decision of the said Board of Tax Appeals in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered Dec. 26, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Saturday, March 16, 1940.

Before: Denman, Mathews and Healy, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION, AND WITHDRAWING OF OPINION OF DEC. 26, 1939, AND DENYING PETITION FOR REHEARING.

By direction of the Court, Ordered that the typewritten opinion and dissenting opinion this day rendered in this cause be forthwith filed by the clerk.

Pursuant to said majority opinion, It Is Ordered that the opinion of this court heretofore rendered and filed on December 26, 1939 be, and hereby is withdrawn, and the opinion this day filed is substituted therefor.

It Is Further Ordered that the petition of taxpayer, filed January 6, 1940, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

On Petition for Review of Decision of the United States Board of Tax Appeals

OPINION

Before: Denman, Mathews and Healy, Circuit Judges.

Healy, Circuit Judge.

The case is here on petition to review a decision of the Board of Tax Appeals. It involves the construction of a provision of §114 (b) (4) of the Revenue Act of 1934.

That act (§23 (m)) provides that in computing net income there shall be allowed as deductions in the case of mines and other natural deposits a reasonable allowance for depletion, according to the peculiar conditions in each case. §114 (b) (4) allows a depletion of 15% in the case of metal mines, subject to the condition that the taxpayer shall state in his first return under the act that he desires depletion computed on that basis. The statute is shown on the margin.[1]

---

[1] "Percentage Depletion for Coal and Metal Mines and Sulphur.—The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, * * . Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property. A taxpayer mak-

In its income tax return for 1934 petitioner, whose business is the mining of gold, made no statement of its election in respect of depletion allowance. The return was made out and filed in January, 1935. On March 3, 1936 petitioner filed an amended return claiming percentage depletion, and also claimed a refund.

Petitioner is a Nevada corporation with its principal office and place of business at Flat, Alaska. Flat is in a remote part of the territory, and conditions of travel are such that it takes weeks for mail originating at that place to reach Tacoma. The slowness of the winter service invariably resulted in current tax return forms reaching Flat too late for timely execution and filing. In order to avoid delinquency, it was the custom of petitioner's officers to use old return forms; consequently taxpayer's original return for 1934 was filed on a 1933 form which had been mailed it by the Collector at Tacoma.

---

ing his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer. * *."

When petitioner's return for 1934 was filled out its officers did not know of the statutory provision allowing percentage depletion, but did know that, unless the law had been changed, petitioner was not entitled to depletion, as it had no basis for cost depletion. The Collector, in sending the forms, had not advised petitioner with respect to statutory depletion. Petitioner first actually learned of the provision in August, 1935, when it was advised by a revenue agent that it was entitled to percentage depletion for both 1933 and 1934. The agent prepared reports to that effect, as a result of which a refund was paid for 1933, but not for 1934.[2] The Commissioner ruled that, as to the latter year, the taxpayer had failed to claim percentage depletion in its original return and hence was not entitled to claim it thereafter.

Had taxpayer's officers known of the 1934 stat-

---

[2]H. Rep. No. 704, 73d Cong., 2d Sess., states: "Section 114 (b) (4). Percentage depletion for coal and metal mines and sulphur: Under the Revenue Act of 1932, percentage depletion was first allowed in the case of coal, metal, and sulphur mines. That act required the taxpayer to make in his 1933 return an election, binding for 1934 and subsequent years, as to whether the depletion deduction in such cases was to be computed upon a percentage basis. To avoid administrative complexity, your committee is of the opinion that the taxpayer making his first return under the bill should be entitled to a new election as to whether he will compute his allowance for depletion in the case of coal, metal, and sulphur mines upon the percentage basis. This section of the bill so provides."

utory provision, they would have elected to take percentage depletion. As soon as they were advised that percentage depletion had been disallowed, they filed an amended return and a claim for refund as above stated. The taxpayer's gross receipts from gold mining for the year 1934 were $99,711.56 and it has paid a tax for that year in the amount of $4,684.00.

On petition for redetermination, the Board of Tax Appeals upheld the Commissioner's ruling denying percentage depletion.

Petitioner argues that amended returns, while not provided for by law, are recognized and have been uniformly construed as being amendments or supplements to the original return. Hence, it is said, the "first" return means an amended first return; so, an election made in an amended first return is an election made in a "first" return.

In the Fourth Circuit, in C. H. Mead Coal Co. v. Commissioner, 106 F. (2d) 388, the court reached a similar conclusion, holding that in using the words "first return" Congress intended to include a first return as properly amended. Any other construction, the court thought, would, in fairness to the taxpayer, be too narrow. Provided the amendment is timely, and is made in good faith in order to correct a mistake, a first return was held to be no less such because amended. By the phrase "timely amendment" we understand that the court meant an amended return made by the taxpayer,

as in that case, "immediately upon learning of its mistake, and before the time for filing its return for the next succeeding year." The holding appears to confuse the statutory requirement with the supposed authority or duty of the Commissioner to relieve against mistakes.

The act applies only to taxable years beginning after December 31, 1933 (§1). Here the taxpayer reported its income on the basis of the calendar year, so that the first return filed by it under the act was the return for the calendar year 1934. By first return, we think, Congress had reference to the return contemplated by §53 of the act, that is, to the return required to be filed on or before the 15th day of March following the close of the calendar year, or within such extended time, not exceeding six months, as has been granted by the Commissioner under §53 (a) (2).

This interpretation is in harmony with Haggar Co. v. Helvering, . . . U. S. . . . (Jan. 2, 1940). That case involved the construction of the phrase "first return" as used in the capital stock tax provision of the 1934 act. The court there held that an amended return, filed during the extended time allowed by the Commissioner for filing the first return under the act, was a timely return and should have been accepted. It pointed out that "it has long been the practice of the Department, in the cases of other types of tax to accept an amended return, filed within the period allowed for filing returns, as the return of the taxpayer for the taxable year."

Had the taxpayer, in the case before us, made its election by amendment within the time allowed by the act for filing returns, or within an added period granted for filing its return, a substantial compliance with the requirements of the act would have resulted. It would seem, indeed, that the taxpayer may make a substituted return of that sort as a matter of right. But petitioner sought to make its election by amending long after the expiration of the statutory period, and it had obtained no extension.

The statute provides that the method of computation elected by the taxpayer, or the method of computing depletion without regard to percentage where the taxpayer indicates no election, shall be applied in the case of the property for all future years. If the view broadly stated by petitioner is correct, an ordinary amended return electing to take depletion allowance on a percentage basis may well throw into confusion the computation of the taxpayer's depletion for ensuing taxable years. However, petitioner suggests a narrower view, in line with Mead Coal Co. v. Commissioner, supra, that the amended return must perhaps be filed before the expiration of the time allowed for making a return for the ensuing year. But if it be assumed that Congress intended to permit an election by amendment after the lapse of the statutory time for making returns, it failed to provide any time limitation of the sort suggested. Not only is there no

such limitation set out in the act, there is, so far as we are aware, no regulation or practice requiring that amended returns, where permitted, be filed "promptly", or within a "reasonable" time, or before the filing of the return for the next year.[3]

Should we adopt a time limitation of this sort, we must perforce embark on waters not charted by Congress or mapped by familiar bureau regulation —an excursion into the legislative domain not open to the courts. If by a first return Congress meant a return as it may be amended in line with the practice heretofore prevailing in cases of other types of tax, it would follow that where a taxpayer inadvertently omits to state his election in a return filed within the statutory period, he may, conformably to the intent of Congress, supply the omission at any time within the three-year period prescribed by §322 for claiming refunds. This construction substantially nullifies other and mandatory provisions of the statute.

The situation is not the ordinary one of the use of an amended return to correct errors and miscalculations. Rather, it is an attempt, by the filing of an amended return, to adopt a method of computation at variance with that which the statute

---

[3]Art. 43-2 of Regulations 86, which permits the filing of an amended return for the purpose of deducting a loss occurring during a prior taxable year but not then ascertained, indicates that such a return may be filed at any time within the period allowed for claiming a refund.

itself irrevocably imprints on the statutory return in those cases where the taxpayer has failed to indicate an election.

In Pacific National Co. v. Welch, 304 U. S. 191,[4] it was pointed out that in the case of overpayment the taxpayer is entitled to a refund calculated according to the method on which the return was based; but that a change from one method to another requires recomputations and readjustments of tax liability for subsequent years and imposes burdensome uncertainties upon the administration of the revenue laws; further, that "it would operate to enlarge the statutory period for filing returns to include the period for the recovery of overpayments." In that case the amended return was filed in an attempt to correct a mistake arising out of the taxpayer's ignorance of his rights under the law. See 95 F. (2d) 590, 592. The right to amend the return was denied.

It is argued that since appellant had exhausted its basis for cost depletion, and was aware of that fact, it had no real election to make—that its choice was either to take percentage depletion or none at all. However, considerations having to do with the general theory of election have little place in the discussion, since we are dealing with a statute pre-

[4]For other cases following the same rule, see Rose v. Grant, 5 Cir., 39 F. (2d) 340; Alameda Inv. Co. v. McLaughlin, 9 Cir., 33 F. (2d) 120; Radiant Glass Co. v. Burnet, Ct. of App. Dist. Col., 54 F. (2d) 718.

scribing more or less arbitrary rules. The act provides in general terms for the computation of depletion allowance in all cases of mines where deductions on account of depletion are claimed, not merely for those instances in which the taxpayer may have a choice between alternative methods. It was proper to require the taxpayer, even though he has no basis for cost depletion, to state in his first return under the act whether he elects to have depletion allowance computed on the percentage basis. The taking of the deduction was a privilege granted the taxpayer; and in order to avail himself of it he must meet the terms on which the offer was held out. It was within the power of Congress to impose the mandatory alternative that the depletion allowance "shall" be computed for the current and future tax years without reference to percentage, if the taxpayer fails to make such statement in his first return.

Congress may condition deductions from gross income in any manner it sees fit. Helvering v. Industrial Life Ins. Co., 229 U. S. 371; Pearl E. Deputy et al. v. du Pont, . . . U. S. . . . (Jan. 8, 1940). It may be, as petitioner says, that it was the purpose of Congress to liberalize depletion allowance, but if so, the liberality was confined to the offer. It did not extend to the time or manner of taking advantage of it.

It appears to be conceded—and the concession is implicit in Mead Coal Co. v. Commissioner, supra—that a taxpayer who knows the law and who desires

percentage depletion is bound to state his choice in his first return under the act, failing which the statute peremptorily removes the right to apply that method in the first and all future tax years. The reason for this peremptory rule is obvious; and the statute contains no saving clause relieving a taxpayer or authorizing the Commissioner to relieve him from the consequences of the rule on a showing that he was ignorant of it. We know of no general power in the Commissioner to waive a mandatory provision of this sort on proof that the taxpayer did not know of its existence; and it is a novel rule of interpretation which varies the meaning of a statute to suit the mental state of those affected by it.

It is thus inadmissible to assume that Congress intended the statutory plan to bind those only who have actual knowledge of it. Government cannot proceed on that basis. The act (§53 (a) (2)) authorizes the Commissioner to grant a reasonable extension of time for filing returns;[5] and the recourse of one in the situation of petitioner would seem to be confined to the obtaining of an extension, if additional time is needed in which to investigate current legislation.

Our opinion heretofore filed as the ground for the judgment of affirmance heretofore rendered is withdrawn and this opinion is substituted therefor. Petition for rehearing denied.

---

[5]Regulation 86, Art. 53-2, Revenue Act of 1934.

Mathews, Circuit Judge (dissenting):

Respondent disallowed the depletion deduction claimed by petitioner because, as stated by respondent, the claim was "based upon an amended return" instead of an original return. On that ground and no other, respondent defended and sought to justify his action. He did not, before the Board of Tax Appeals or in this court, claim or suggest that the amended return was not timely. His sole contention, before the Board and here, was that the amended return was not a "first return", within the meaning of §114(b) (4) of the Revenue Act of 1934, 48 Stat. 710, 26 U. S. C. A. §114(b) (4), and that, therefore, the claimed deduction could not be allowed. This contention, which the Board upheld, should be rejected. Haggar Co. v. Helvering, . . . U. S. . . ., decided January 2, 1940;* C. H. Mead Coal Co. v. Commissioner, 4 Cir., 106 F.2d 388, 390. Since respondent has raised no question as to the timeliness of the amended return, this court cannot, with propriety, consider or decide any such question.

The decision should be reversed.

[Endorsed]: Opinion and Dissenting Opinion. Filed Mar. 16, 1940. Paul P. O'Brien, Clerk.

---

*Reversing Haggar Co. v. Commissioner, 5 Cir., 104 F.2d 24, relied on by respondent.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Mr. Robert Ash, counsel for the petitioner, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including April 15, 1940; and in the event the petition for a writ of certiorari to be made by the petitioner herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

WILLIAM HEALY
United States Circuit Judge.

Dated: San Francisco, California, March 18, 1940.

[Endorsed]: Filed Mar 19 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fifty-nine (59) pages, numbered from and including 1 to and including 59, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the petitioner, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 25th day of March, A. D. 1940.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 20, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9429)